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No. 610.

Brief of J. K. Cammon & Hayden for Appellee.

Supreme Court of the United States.

Filed Apr. 26, 1902.

ROBERT W. McLAUGHRY, AS WARDEN OF THE U. S. PENITENTIARY AT FORT LEAVENWORTH, KANSAS,

APPELLANT, } No. 610.

v.

PETER C. DEMING.

Appeal from the Circuit Court of the United States for the District of Kansas.

BRIEF FOR THE APPELLEE.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Appellee.

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IN THE

Supreme Court of the United States.

ROBERT W. McLAUGHRY, as Warden of the U. S. Penitentiary at Fort Leavenworth, Kansas,
Appellant,
v.
PETER C. DEMING.
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Statement of the Case.

The appellee, Deming, being imprisoned in the United States Penitentiary, at Fort Leavenworth, filed his petition for a writ of *habeas corpus*, in the court below, on September 11, 1901 (*pp.* 1–3). The writ was issued on February 22, 1902, and served upon the respondent McLaughry, the warden of the prison (*pp.* 3–4), who, in due course, made answer (*pp.* 4–22). To this answer, Deming demurred (*p.* 22). After hearing on demurrer, the court ordered his release, but the respondent having taken an appeal to this court (*p.* 24), it was provided by the order that he should furnish bail in the sum of $2,000, and should be remanded to custody, pending the

giving and approval of his bond (*p.* 23). The bond was given and approved and he was released (*pp.* 24-25.)

The facts, presented by the pleadings are matters of record, concerning which there can be no issue. On June 6, 1898, Deming was appointed a commissary of subsistence with the rank of captain of United States volunteers, pursuant to the provisions of the act of April 22, 1898, entitled "*An act to provide for temporarily increasing the military establishment of the United States in time of war.*" (30 *Stat. L.*, 361.) This fixed the term of his enlistment at "two years, unless sooner terminated" (*Sec.* 4). Subsequently he was continued in the volunteer service by order of the President issued pursuant to the provisions of the act of March 2, 1899, entitled "*An act for increasing the efficiency of the army of the United States.*" (30 *Stat. L.*, 977.) Under the President's order his service could not have been continued beyond June 30, 1901. (*Id.*, *p.* 981, *Sec.* 15.) On March 29, 1900, General Shafter, assuming to act as the commander of the Department of California, issued an order (*pp.* 1, 2, 4), whereby he attempted to appoint a general court-martial for the trial of Captain Deming, as an assistant commissary of subsistence of volunteers. General Shafter was then upwards of sixty-four years of age, and was a retired officer, but had a commission as major-general of volunteers (*pp.* 1, 3; *see also* "*Official Register of Officers of Volunteers, etc., June* 1, 1900," *p.* 7). All of the officers named in the order as the "detail for the court," held and were serving under commissions in the regular army. None of them held commissions in the volunteer service (*pp.* 2, 4). The court so organized and constituted proceeded to try Deming, and thereupon sentenced him to be dismissed from the service of the United States, and to be confined

in such penitentiary as the reviewing authority might direct, for a period of three years (*pp.* 1, 4, 8). This sentence was approved by Shafter and confirmed by the President (*pp.* 1, 8). The warrant or mittimus, by virtue of which Deming was imprisoned, was this order, issued from the headquarters of the army (*pp.* 1, 9):

> "By direction of the Secretary of War, Captain Peter C. Deming, Assistant Commissary of Subsistence, U. S. Volunteers, ceases to be an officer of the Army from June 12, 1900, and the United States penitentiary at Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the Commanding General, Department of California, under proper guard."

The petition shows that, by reason of the foregoing facts, General Shafter had no authority to appoint a general court-martial, hence, that his order did not create one; that the officers detailed for the court were not authorized to act as a court-martial, and each one was prohibited by law from trying Deming, wherefore his arraignment, trial, and sentence were without warrant, and in violation of law, and void; his imprisonment was unlawful, and thereby he was deprived of his liberty without due process of law, in violation of his rights, guaranteed by Article V of the Amendments to the Constitution (*pp.* 2–3).

The return, or answer of the respondent (pp. 4–22), sets out, at length, the various proceedings, including the order, purporting to appoint the court, the record of the alleged trial, and the endorsements made thereon by the reviewing authorities. It asserts that all of the proceedings were had in conformity with law, and that the ensuing imprisonment of Deming was lawful. The only issues raised in, and decided by the court below, were questions of law, involving the construction

and application of Article V of the Amendments to the Constitution and of certain acts of Congress. On this appeal, which is taken by the respondent in his own behalf and on the behalf of the United States, there is but one assignment of error. It makes the broad and sweeping charge that the court below erred in deciding that the facts set forth in the answer did not justify the imprisonment of Deming, and that he was entitled to be released. The case can be considered most conveniently by classifying the questions raised under three general propositions: (1) The officers who tried Deming did not constitute a court-martial or other lawful tribunal, wherefore their proceedings and sentence were void. (2) The officers in question were individually and collectively incompetent to sit upon a court-martial to try Deming, and for that reason, alone, their proceedings were unlawful and void. (3) Being imprisoned without due process of and contrary to law, Deming was entitled to seek his remedy in the federal courts, and to obtain his release through *habeas corpus* proceedings.

Argument.

I.

The officers who tried and sentenced Deming never had any authority to convene or act as a general court-martial, and all things done by them, or by the reviewing authorities pursuant to their sentence, were unauthorized by and contrary to law, and were void.

The statute which regulates all things appertaining to courts-martial (*R. S. U. S., Sec.* 1342), has an object far more important than the securing of a uniform procedure in the trial or punishment of persons charged or found

guilty of military offenses. The exigencies of the military service and public necessity require that officers and soldiers of all troops, mustered in the service of the United States, shall at all times be governed by the articles of war and subject to be tried by courts-martial (*Id., Art.* 64; *Act of April* 22, 1898, *Sec.* 6, *supra*). The effect of this is to subject the persons, concerned, to rules more stringent than those imposed upon other citizens, and to deprive them, when charged with certain offences, of the right to trial by jury, before a court, learned in the law. Through lack of education and experience, officers sitting upon a court-martial, neither know nor can they correctly apply the principles of law, adherence to which has come to be regarded as essential to the administration of justice. Again: conviction by a court-martial may be had by vote of a majority of its members. While Congress appreciated that in these particulars persons in the military service must forfeit certain of the privileges of civilians, it was careful to define the extent of the forfeiture, and as the best practicable safeguard against the infliction of unjust punishments, laid down explicit rules to govern the appointment, organization and proceedings of courts-martial. It defined their jurisdiction, with respect to the persons and causes triable; and prescribed the manner in which their sentences must be confirmed and executed.

This leads us to make the following inquiries: What is a court-martial? How can such a court be created? How must it proceed? What is the effect of a failure to observe any one of the statutory requirements? These questions have been passed upon by this court, and have received the consideration of able writers upon military law.

In the case of *Runkle* v. *United States* (122 *U. S.* 543, 561) Chief Justice Waite, delivering the opinion of the court, said:

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved (3 *Greenl. Ev. Sec.* 470; *Brooks* v. *Adams*, 11 *Pick.* 441, 442; *Mills* v. *Martin*, 19 *Johns*, 33; *Duffield* v. *Smith*, 3 *Serg. & R.* 590, 599). Such also is the effect of the decision of this court in *Wise v. Withers* (3 *Cranch*, 331), which, according to the interpretation given it by Chief Justice Marshall in *ex parte Watkins* (3 *Peters*, 193, 207), ranked a court-martial as: '*One of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.*' *To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law* (*Dynes* v. *Hoover*, 20 *How.* 65, 80; *Mills* v. *Martin*, 19 *Johns.* 33). *There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in Brown* v. *Keene* (8 *Pet.* 112, 115), *in respect to averments of jurisdiction in the courts of the United States applies, and his language is*: '*The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which the jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.*' *All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.*"

General Davis, the present Judge Advocate General of

the Army, in his work, entitled "*Military Laws of the United States*" (*Ed. of* 1898, *p.* 15), said:

> "Courts-martial are no part of the judiciary of the United States, but simply instrumentalities of the executive power. They are creatures of *orders*. The power to convene them, as well as the power to act upon their proceedings, being an attribute of command."

Again, he said (*Id.*, *p.* 42):

> "Courts-martial * * * are courts of limited jurisdiction, and as such their records must show affirmatively that they have authority to hear and determine cases coming before them for trial."

Col. Winthrop, a well-recognized authority on military law, has expressed the same view with regard to the status of courts-martial (*Winthrop's Military Law, etc.*, *pp.* 53–55).

It is clear, and is conceded by the appellant, that a court-martial is not a court, according to the ordinarily accepted meaning of that term. Forming no part of the judicial system, and having no permanent organization, nor any general jurisdiction, there is no presumption in favor of its existence, or of the regularity or validity of its proceedings. All of these things must affirmatively appear from the record of the tribunal, assuming to act as a court-martial, in order that its sentence shall have any validity in law, or furnish justification for persons, assuming to confirm or execute its sentence. At common law, there prevailed a presumption in favor of the validity of the judgments of a tribunal assuming to act as a court of general jurisdiction, but it was not conclusive. Such a presumption has not been generally recog-

nized in this country, and upon proof that the alleged court was convened or organized in a manner unauthorized or forbidden, its judgments will be decared null and void, *ab initio*. In the case of *Brumley* v. *State* (20 *Ark.* 78), it was said:

> "The meeting together of the judges and officers of a court at the place, but not at the time fixed by law for holding the court, was not a court under our constitution and laws, but was a mere collection of officers, whose acts must be regarded as *coram non judice* and void."

It appears from the "*Official Register of Officers of Volunteers, etc.*" (*supra, p.* 7), which was published by authority of the Secretary of War on June 1, 1900, that General Shafter had served as an officer of the regular army until October 16, 1899, when he was retired from active service. It is stated in the petition (*p.* 1) and conceded that he had then reached the age of sixty-four years. It was claimed in the answer of the respondent (*p.* 4) that on March 29, 1900, when the order providing for the appointment of a court-martial to try Deming, was issued by him, Shafter was a major-general of volunteers, exercising the command of the Department of California, by virtue of an assignment of the President of the United States, as commander-in-chief of the army. This proposition is untenable for two reasons:

(*a*) The act of June 30, 1882, entitled, "*An Act making appropriations for the support of the army*," *etc.* (22 *Stat. L.* 117, 118), provides:

> "That on and after the passage of this Act, when an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the Presi-

dent, be retired from active service and placed on the retired list, *and when an officer is sixty-four years of age, he shall be retired from active service and placed on the retired list.*"

The Act of March 2, 1899 (30 *Stat. L.*, 977, 979, *Sec.* 2, *second proviso*), reads:

> "That *in time of war*, retired officers of the army may, in the discretion of the President, be employed on active duty, *other than in command of troops*, and when so employed they shall receive the full pay and allowances of their grades."

Under the provisions of the act of 1882 (*supra*), the retirement of General Shafter, on October 16, 1899, was compulsory. Neither he nor the President had any option in the matter. The provisions of the acts of 1882 and 1899 (*supra*) were applicable alike to service in the regular and in the volunteer force. After his retirement General Shafter's employment on active duty would have been lawful, only "*in time of war*," if war had existed. His employment in time of peace was prohibited. On March 29, 1900, a state of war did not exist in California, or elsewhere in the United States. The only war in which the United States has been engaged, of recent years, was that with Spain, which was terminated by the treaty of Paris, concluded on December 10, 1898. Since then the existence of war, to which the United States was a party, has not been recognized by Congress, or the Executive, or by a foreign State. Without such a recognition, a state of war cannot exist. From the cessation of hostilities—even before the conclusion of the treaty of Paris—proclamations made by the President show that peace has prevailed without interruption. (*Proclamations of October*

28, 1898, *October* 25, 1899, *and October* 29, 1900.) In the spring of 1900, quiet and good order prevailed throughout California. All functions of government were proceeding in a normal manner, being discharged by the civil authorities without the intervention of the military authorities, or resort to martial law. The civil commotions and isolated acts of resistance to the authority of the United States then occurring in certain parts of the Philippine Islands did not constitute a state of war, even at the place of their occurrence, but in no event could conditions prevailing in the Philippines affect the status of territory comprehended within the military department of California, or any other portion of the United States where profound peace prevailed. (*The Protector*, 12 *Wall.* 700; *Ford* v. *Surget*, 97 *U. S.* 594; *Heflebower* v. *United States*, 21 *C. Cls.* 228, 233.) These things were well understood by the War Department, for in 1900 the army was not organized on a war footing as provided by the act of 1898 (*Sec.* 9). It was divided into territorial departments, the method of organization which prevails in time of peace.

(*b*) If a state of war had existed on March 29, 1900, General Shafter, being a retired officer, could not, lawfully, have been assigned to duty as the commander of the Department of California. As we have seen the act of March 2, 1899 (30 *Stat. L.* 977, 979), which authorizes the employment of retired officers on active duty "*in time of war*," expressly provides that the duties on which they may be employed shall be "*other than in command of troops.*" The regulations for the army, published by the Secretary of War, under the President's direction, prescribe the duties of the commander of a department. Among other things it is provided (*U. S. Army Regulations, p.* 31):

> "208. The commander of a department *commands all the military forces of the Government within its limits*, whether of the line or staff." * * *

As the commanding officer of the Department of California, General Shafter actually exercised command of the troops stationed therein. This was contrary to law. The law regulating the appointment of general courts-martial is contained in the 72d article of war, which reads:

> "Any general officer commanding an army, *territorial division* or a department, or colonel commanding a separate department, may appoint general courts-martial, whenever necessary."

The power to order a court-martial is undoubtedly an attribute of command. (*Davis, Military Laws of U. S., supra, p.* 15.) In order to give validity to such an order, it must affirmatively appear that the officer who made it was a general officer: (1) lawfully retained upon active duty, (2) having command of an army, territorial division, or department. We have seen that General Shafter did not possess either of these qualifications. In assuming to order a general court-martial, he did that which the law did not permit, and his order and all acts done in consequence thereof, were null and void. (*Runkle* v. *United States*, 122 *U. S.* 543; *Dynes* v. *Hoover*, 20 *How'd*, 65 *supra.*)

Where several officers come together and proceed to discharge the functions of a court-martial without authority to do so, no subsequent act of the reviewing authority can operate retroactively to invest them with a judicial character or with jurisdiction which they did not possess, or clothe their invalid acts with any species of validity. Deming was not tried by a lawful tribunal, and in contemplation of law there was no sentence imposed upon him,

which could either be confirmed or executed. The warrant or mittimus, set up by the respondent, as his justification for Deming's imprisonment, cannot afford him any justification. Deming was deprived of his liberty without due process of law.

Ex parte Reed (100 *U. S.* 23); *Ex parte Watkins* (3 *Pet.* 193); *In re Glenn* (54 *Md.* 572); *Commonwealth* v. *Leckey* (1 *Watts, Penn.* 66); *Bell* v. *State* (4 *Gill, Md.* 305).

Counsel for the respondent will probably argue that there is no age limit, beyond which officers of volunteers cannot be retained in active service. We have seen, however, that such a limit is prescribed for volunteers as well as for regulars by the act of 1882 (*supra*). Doubtless they will argue that inasmuch as Shafter's appointment in the Volunteer Army was authorized by the act of 1898 (Section 11), he was entitled to remain on active duty as a volunteer, in spite of his retirement as a regular. To sustain such an argument they must also maintain that the section of the act of 1898, being a general provision of law with respect to the appointment of officers of the regular army as officers of volunteers, was not in any way limited by the second provision of Section 7, of the act of 1899, which is specific and forbade the employment of retired officers on active duty, except in time of war, and forbade their assignment to the command of troops, at any time. The later and specific statute is in accord with the general rule that has prevailed with regard to the employment of retired officers on active duty. It must be regarded as a controlling limitation upon the earlier and more general provision of law. (*Rodgers* v. *United States*, *No.* 317, *October Term*, 1901.)

II.

Irrespective of the fact that the officers who tried Deming, did not constitute a general court-martial, they were individually and collectively incompetent to try him. All of their proceedings and the ensuing acts of the reviewing authorities were void.

The alleged court-martial was composed of officers of the regular army, all of whom were serving under their commissions therein. Deming was a volunteer, and as such was accused, arraigned, tried and sentenced.

The 77th article of war (*Sec.* 1342 *R. S. U. S.*) is this:

> "ART. 77. *Officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article* 78."

Article 78 has no bearing upon this case. It relates to trials of persons belonging to the regular army and the marine corps, when forces from the two are acting together.

In this and in other cases which have arisen since the outbreak of the late war with Spain, officers of the regular army have been detailed for courts-martial to try officers and soldiers of volunteers. A circular issued by the War Department on June 30, 1898 (*Circular No.* 21, *Headquarters of the Army*) made the announcement that under the provisions of the act of April 22, 1898 (*supra*), the regular army and the volunteer army did not constitute separate forces, and therefore officers of the regular army were competent to sit on courts-martial to try officers and soldiers of the volunteer service. Such "a departmental construction of statutes will not be fol-

lowed by the courts when it is clearly erroneous" (*U. S.* v. *Tanner*, 147 *U. S.* 661). To justify such an interpretation of the act of 1898 it is necessary to assume that Congress intended it to operate as a repeal of the 77th article of war, or to render it inoperative, and a dead letter, in so far as it relates to volunteers or persons who are serving temporarily in the military service of the United States, as distinguished from militia or State troops mustered in the federal service. Congress has never in express terms repealed or annulled the article. Repeals and annulments by implication are not favored in law. The courts have never adopted such an implication unless compelled to do so by the utter inconsistency or repugnance of the provisions of an older and a later statute. Mr. Justice Story, delivering the opinion of this court in the case of *Wood* v. *United States* (16 *Peters*, 342, 362), said:

> "That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative, accumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication, only, *pro tanto*, to the extent of the repugnancy."

In the case of *State* v. *Stoll* (17 *Wall.* 425, 430), it was said:

> "If by any reasonable construction the two statutes can stand together they must so stand."

In the case *Cope* v. *Cope* (137 *U. S.* 682), it was said:

> "Nothing is better settled than that repeals, and the same may be said of annulments by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction."

The obvious purpose of the 77th Article of War will be sustained by the courts, notwithstanding that it may have received a contrary construction by the War Department. (*Webster* v. *Tucker*, 163 *U. S.* 331.)

A brief inquiry into its origin will give us an understanding of its meaning and scope, and will show that it was intended to apply to a force such as that made up of the volunteers who were enlisted in the service of the United States, during the years 1898 to 1899.

It was enacted in 1874 and then supplanted Article 97 of the Military Code of 1806 (2 *Stat. L.* 359), which provided:

> "The officers and soldiers of any troops, whether militia or others, being mustered in the pay of the United States, shall at all times and in all places when joined or acting in conjunction with the regular forces of the United States be governed by these rules and articles of war, *and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces save only that such courts-martial shall be composed entirely of militia officers.*"

This article had its origin in similar provisions contained in the military codes of 1775 and 1776, which like Article 97 were adapted to the conditions, prevailing at the time of their enactment. Prior to 1806, the United

States had never organized a force of United States volunteers, as distinguished from militia organizations, mustered in the service of the United States which, though subject to the military laws of the United States, while in its service, retained their status as State troops and did not form part of the Army of the United States. It was not until the War of the Rebellion that a volunteer force was organized by direct enlistment in the federal service. It then became a serious question, whether Article 97 made officers of the regular army incompetent to sit on courts-martial to try officers and soldiers of the volunteer force. To relieve the situation of all doubt—to prohibit the trial of any person in the temporary military establishment by officers of the Regular Army, or permanent organization—Congress, in 1874, enacted the 77th Article of War (*supra*). To deny this is to contend that the act of 1874 had no effect beyond that of 1806. Counsel for the appellant actually make the assertion that the 77th article was no more than a re-enactment of the former 97th article. This, in spite of the radical difference of the language employed and of the fact that in 1874 Congress had a kind of force to provide for, which in 1806, had neither existed, nor could its existence be anticipated. It is worth while to compare the two articles carefully.

Code of 1806—Art. 97.	Code of 1874—Art. 77.
"*The officers and soldiers of any troops, whether* MILITIA *or others* * * * *shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of* MILITIA OFFICERS."	"*Officers of the regular army shall not be competent to sit on courts-martial to try officers or soldiers of other forces.* * * *"

Nothing could be plainer than that Congress wished to place volunteers and all other persons in the temporary

service, upon the same basis, for purposes of trial as the militia.

General Benét, in a treatise on military law, written in 1866, after the first employment of United States volunteers, said (*Benét, Military Law, p.* 25):

> "The words, 'militia officers,' as employed in the 97th article (code of 1806) have been interpreted as synonymous so far as the organization of courts-martial is concerned with volunteer officers. This construction accords with the *spirit* of the article, and in its practical enforcement the object of the rule is accomplished. A court composed of regular officers cannot try a volunteer officer, though a regular officer may be tried by a court of volunteers."

In Winthrop's Military Law and Precedents (*Vol. I, p.* 92), it is said:

> "By '*regular army*' is to be understood the *permanent military establishment as especially distinguished from* VOLUNTEERS *or* MILITIA *in the federal service.* These two contingents, volunteers and militia, are indeed quite distinct from each other. *The former, as will be further illustrated in the next chapter, being for the time equally with regulars, a part of the Army of the United States, while the latter, though in the employment of the nation, are State troops. But in view of the comprehensive and general term 'officers and soldiers of* OTHER FORCES,' *the article* (77*th article of war*) *has been considered as disqualifying regular officers from acting as members of courts-martial for the trial of any officers or soldiers not of the Regular Army, whether volunteers, militia, drafted men, or any persons, except the class of* MARINES *designated in the next article* (78). *Thus a court composed entirely of regular officers cannot legally be ordered for the trial of an officer or soldier of another military force, nor where such a*

court has been once duly created for the trial of a regular or regulars is it qualified to proceed to the trial of a volunteer, etc., if brought before it for trial. And where a court is not entirely, but only partly so composed, even if it comprises five officers of another force, eligible for the particular trial, it cannot, legally, proceed to such trial."

In his work entitled "*Abridgment of Military Law*," Col. Winthrop said of the 77th article of war (p. 29):

"*Regular officers cannot as members of courts-martial legally take part in the trial of volunteers, or militia officers, or soldiers. On the other hand, however, there is no law to prevent the officers of volunteers or militia in service in time of war, from acting as members of courts-martial for the trial of regular officers, or soldiers. In the late war (Rebellion) volunteer officers were not infrequently detailed upon such courts.*"

Again in the same work he said (*p.* 37):

"*In time of war the regular contingent has commonly been supplemented by a force of volunteer troops; in the late war (Rebellion) indeed the volunteers composed by far the greater portion of our army. Though in some particulars of its organization, assimilated to the militia, this force, in fact as well as in law, is quite distinct therefrom.* * * * *That this force (volunteers) though differing from the regulars in that it is resorted to for a temporary purpose is equally, with the latter, a part of the Army of the United States, has been expressly adjudicated.*"

Another well recognized authority (*Davis: Military Laws of the United States; Ed. of* 1897, *p.* 490, *Note* 1), said:

"*Although officers and soldiers of volunteers, not being militia, are as much a part of the Army*

of the United States as are regular officers, yet in in view of the terms of this article (77), an officer of the regular army, so-called, would not be eligible to detail as a member of a court-martial convened for the trial of volunteer officers or soldiers, nor when duly detailed as a member of a court-martial would he be competent to take part in a trial of a volunteer by such court."

In an opinion of the Judge Advocate General of the Army (*Dig. Opin., J. A. G., p.* 745), it was held:

"*The volunteer force during the late war (Rebellion) was not a part of the militia, but of the Army of the United States. Though assimilated to the militia in some respects, as for example, in the mode of original appointment of regimental and company officers, it was as distinct in law from the militia as was the so-called regular contingent of the army.*"

The laws which forbade and still forbid regulars to try volunteers, are not mere arbitrary regulations, but had its foundation in reason and justice. The conditions affecting regulars and volunteers are radically different. The latter, like the militia, forsake the pursuits of civil life in response to their country's call to arms, and necessarily lack the training, experience, and knowledge of military affairs which the professional soldiers of the regular army should have. For these reasons Congress directed that volunteers, as well as other persons in the temporary force, for infractions of discipline, should have the same safeguard that is accorded to all citizens of the United States, namely, the right to trial by their peers, and should not be subject to trial by men, who would exact of them a standard, which the professional soldier, with no life work other than that of arms, would surely demand. Again: it is a matter of uni-

versal knowledge, both in the Army and out of it, that officers of the regular army regard with dislike and jealousy the conferring of commissions upon volunteers because, without previous military experience, the latter become the equals or superiors of men who have rendered years of service. Congress, appreciating that this dislike and jealousy must warp the judgment of regulars and lead to acts of injustice, forbade that regulars should try volunteers.

Since the passage of the act of April 22, 1898 (*supra*), the War Department has acted upon the supposition, and the respondent now contends, that volunteers enlisted under that act were not volunteers in the ordinary sense, but in spite of being so termed were, in effect, short-term regulars, and together with the permanent organization, constituted one and the same "force." The language of the act, itself, shows the fallacy of this position. Congress intended to preserve the distinction between the permanent and the temporary organizations. While both are spoken of as being included in the Army of the United States, the permanent and the temporary establishments were to constitute distinct branches and be known as the Regular Army and the Volunteer Army, respectively, the latter including the volunteers and the militia when in service. This is the language employed (*Sections* 2, 3, *and* 4):

> "SEC. 2. That the organized and active land forces of the United States shall consist of the Army of the United States and of the militia of the several States when called into the service of the United States: *Provided, That in time of war the Army shall consist of two branches which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States.*

"SEC. 3. *That the Regular Army is the permanent military establishment, which is maintained both in peace and war according to law.*

"SEC. 4. *That the Volunteer Army shall be maintained only during the existence of war, or while war is imminent, and shall be raised and organized, as in this Act provided, only after Congress has or shall have authorized the President to raise such a force or to call into the actual service of the United States the militia of the several States.*"

The War Department's interpretation of the act in so far as it relates to trials of volunteers, is as follows (*Circular No.* 21, *June* 30, 1898, *supra*):

> "As the act to provide for temporarily increasing the military establishment of the United States in time of war, approved April 22, 1898, declares that the Army of the United States in time of war shall consist of both the regular army and the volunteer army, it cannot be held that the volunteer army is, with reference to the Regular Army 'other forces,' within the meaning of the 77th article of war, but regular officers may now sit on courts-martial for the trial of volunteer officers or soldiers."

The official responsible for this circular evidently labored under the erroneous impression that it was not until after the passage of the act of 1898 that United States volunteers, when in active service, constituted equally with regulars a part of the Army of the United States. We have just quoted the leading authorities all of which take the opposite view. The status of the volunteers was left by the act of 1898 precisely as it had been before 1874, when the 77th article of war was enacted. Because Congress said that the "land *forces*" of the United States in time of war should consist of two "branches," it cannot be assumed to have meant that those two "branches"

should constitute one "force," the effect of this being to repeal the 77th article of war and deprive volunteers of the safeguard against injustice, which, from the very foundation of the nation, had been provided for those temporarily employed in its military service. The act of 1898 contains many provisions which relate to the volunteer army alone, such as the manner in which its officers should be appointed, and its men enlisted, the term of their service, and like matters, all of which are very different from similar provisions of law applicable to the regular army, alone. This shows that Congress intended to preserve the integrity of the volunteer force, although, as in all former instances, that force was to be "*organized under and subject to the laws, orders, and regulations (including Article 77), governing the regular army.*" A striking instance of this, showing that Congress appreciated the necessity for continuing the operation of the 77th article of war, is found in the 14th section of the act, which reads:

> "That the general commanding a separate department or a detached army is authorized to appoint from time to time military boards of not less than three or more than *five volunteer officers of the volunteer army* to examine into the capacity, qualifications, conduct and efficiency of any commissioned officer of said army within his command."

Here Congress was careful to limit the composition of the boards, not only to officers of the volunteer army, but volunteer officers, as distinguished from regular officers serving temporarily under volunteer commissions.

If the formal designation of the "Volunteer Army," provided for by the act of 1898, as a "*force*," were essential, to show that that "army," or "branch" of the army of the United States, constituted a force other than that of

the "Regular Army," within the meaning of the 77th Article of War, proof that such was the intention of Congress and that the War Department's interpretation of the act was contrary to the legislative intendment is found in subsequent legislation. The act of May 11, 1898 (30 *Stat. L.* 405), provided:

> "That in addition to the volunteer *forces* provided for by the act of April 22, 1898, * * * the President may authorize the Secretary of War to organize * * * "
>
> "SEC. 2. And the President is further empowered during the present war under the act of April 22, 1898, to authorize the Secretary of War to organize an additional volunteer *force*. * * * "

We have seen that Deming was enlisted in the volunteer service pursuant to the provisions of the act of April 22, 1898. The *Official Register of Officers of Volunteers* (*supra, p.* 20), shows that he received no commission other than that issued to him at the time of his appointment, on June 6, 1898. He was, however, retained in the military service by order of the President, made pursuant to the provisions of the Act of March 2, 1899. Let us see whether that act or the orders of the President, made pursuant thereto, changed the status of the volunteers who were retained in the service, and constituted them short-term regulars or a portion of the "force" which included the regular army. The act (30 *Stat. L. pp.* 977 *et seq.*) made provision for the composition of the "Army of the United States," giving the number of officers to be retained in each of the grades thereof (*Sec.* 1). It prescribed the composition of cavalry regiments (*Sec.* 2); artillery regiments (*Sec.* 3), and infantry regiments (*Sec.* 4). It authorized the filling of certain vacancies in the army (*Sec.* 5). It made provision for the organization

of certain staff and auxiliary departments (*Secs.* 6 *to* 11). All of these sections related to the permanent military establishment, or regular army, the maximum strength of which was increased to 65,000 men, in order to meet the then existing exigencies of the military service (*Sec.* 12). In addition to this, the President was authorized

> "to raise a *force* of not more than thirty-five thousand *volunteers* to be recruited as he may determine from the country at large or from the localities where their services are needed, without restriction as to citizenship or educational qualifications, and to organize the same into not more than twenty-seven regiments organized as are infantry regiments of war strength in the *regular army*, and three regiments to be composed of men of special qualifications in horsemanship to be organized as cavalry regiments for service mounted or dismounted."

It was provided that—

> "All enlistments for the *volunteer force herein authorized* shall be for the term of two years and four months, unless sooner discharged." (*Sec.* 12.)

The President was empowered to continue in service or to appoint brigadier and major-generals of volunteers, in addition to those of the regular army (*Sec.* 13); also to continue in service or appoint certain officers of the volunteer staff, including twelve assistant commissaries of subsistence with the rank of captain (*Sec.* 14).

It was provided—

> "That all volunteer staff officers herein authorized to be appointed or retained in the service shall be honorably discharged on July first, nineteen hundred and one, or sooner if their services are no longer required."

Also that all other volunteer officers and enlisted men should be mustered out of service and discharged in the manner provided by the act of April 22, 1898, and that on July 1, 1901, the army be restored to the basis which existed prior to April 1, 1898.

Also,

> "That enlisted men of volunteers who desire to remain in the military service, *either* in the *regular army* or the *temporary force authorized by this act*, may, if found qualified therefor, be transferred to and enlisted in such batteries, troops or companies as may be below the maximum authorized strength, and when so transferred and enlisted, shall be credited on their new enlistment with the periods of service rendered by them respectively as *volunteers*."

No other provisions of the act are pertinent to the issues in this case, except the one with reference to the employment of retired officers on certain active duty, in time of war (*Sec.* 7). Of this mention has already been made and we shall have occasion to refer to it later.

Neither the act, nor the order of the President did away with the volunteer force or consolidated it with the regulars. On the contrary, if it can be said that the War Department had any plausible reason for permitting regulars to try officers and men of the volunteer army, as organized under the act of 1898, no color of reason for such a course remained after the passage of the act of March 2, 1899. No language could make it plainer than that employed in the portions of the latter act which we have just quoted, that the volunteer force of 35,000 men, authorized, was intended to be like similar forces, previously organized, and to be entirely distinct from the permanent organization. It is wholly immaterial that the act spoke of the army of the United States as comprising

both forces, or that, under the provisions of the act, members of the volunteer force might be assigned to duty with regulars and, for the more efficient conduct of military operations, the permanent and the temporary organization should be more closely allied. It is enough that the temporary force continued to exist as a separate organization and that the significant term "volunteer" was applied to it.

Certain acts of the War Department show that the military authorities have not been consistent in treating volunteers as part and parcel of the same force as the regulars. In the "*Official Register of Officers of Volunteers in the Service of the United States, Organized under the Act of March* 2, 1899," a public executive document already referred to, which was published by order of the Secretary of War on January 1, 1900, we find a complete list of the officers, who were then serving in the volunteer force. At the same time a separate list of all officers serving in the permanent organization was preserved, and published as a separate document.

In General Orders, *No.* 41, *Headquarters of the Army*, issued on May 10, 1898, we find this language employed with respect to the equipment of the volunteer army, authorized for by the act of April 22, 1898:

> "In order that the volunteer *forces* now being organized may know what arms * * *"

In General Orders, *No.* 55, *Headquarters of the Army*, issued on May 26, 1898, volunteers were spoken of thus:

> "The *force* provided for in the second section of the aforequoted act of Congress * * *"

In General Orders, *No.* 73, *Headquarters of the Army*, issued on June 21, 1898, the Secretary of War spoke of

the troops comprising an army corps, which was made up in part of regulars and in part volunteers, as "*forces.*" The use of the plural number is significant.

In many other orders issued from the Headquarters of the Army the words "force" and "forces" are used interchangeably to describe a great variety of organizations such as the troops stationed in a particular locality, or those organized for a particular duty, or enlisted or organized under a particular act. This shows that the term has no well recognized and technical significance in military law, or among military men. In no instance other than that of the circular of June 30, 1898, have the military authorities attempted to give it a strained or narrow meaning. It is evident that this circular had its origin in the jealousy and dislike with which regulars have always regarded volunteers, and was a poorly concealed attempt to evade the requirements of the Article of War, and in this way to place volunteers at their mercy.

Another act of the War Department, which has already been considered in the preceding branch of this argument, has a direct bearing upon the present question. We have seen that several months before he ordered Deming's trial, General Shafter had reached the age when his retirement from active service became compulsory; he had been retired, but contrary to law was still assuming to perform active duty, in command of troops, and in time of peace. How the respondent will attempt to excuse this violation of law, we cannot see. His counsel are silent on the subject. They may argue that the commission which he held in the volunteer army gave his acts some sort of validity. If such an argument were sound, would it not follow of necessity that the volunteers constituted a force other than that of the regulars? It would be absurd to say that the act of 1899 (*Sec.* 7) made an officer forever in-

competent to perform certain duties under certain conditions, but a little jugglery and a change of his title would render him competent to perform the very same duties in the same force and under circumstances wholly identical.

The record before us contains no opinion of the court below and, strictly speaking, there was none which could be sent up to this court. The explanation of this is that when Deming filed his petition in September of 1901, the Circuit Court refused to grant a writ of *habeas corpus*. Deming took an appeal to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the decree of the Circuit Court and remanded the case, with the direction that the writ be granted and further proceedings in the cause be had in conformity with the law as stated in the opinion. To this opinion of the appellate court, delivered by Judge Sanborn, we respectfully refer this court. For the sake of convenience a copy of it is appended to this brief (*See "Appendix"*). On the question now under consideration it gives a clear and complete review of the pertinent statutes, and tracing the article of war to its origin, shows most conclusively that it was intended to protect officers like Deming from trial by regulars and that it has neither been repealed nor has its operation been curtailed.

We submit that the trial was a flagrant violation of the law. If the officers named in General Shafter's order had been authorized to proceed as a court-martial to try anybody, each and every of them was incompetent to try Deming. The acts of each one and of all, done in the course of the trial, were void. The sentence imposed upon Deming never had any validity or legal effect, and the same is necessarily true of all acts of the reviewing and executive authorities, which ensued it.

III.

The petitioner being imprisoned under the circumstances related, was entitled to seek and obtain his release by writ of habeas corpus.

In the case of *Dynes* v. *Hoover* (20 *Howd.* 65, 83), it was said:

> "With the sentences of courts-martial, which have been convened regularly, and have proceeded legally, by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil court have nothing to do, nor are they in any way alterable by them. * * * *But, we repeat, if a court-martial has no jurisdiction, over the subject-matter of the charge it has been convened to try or shall inflict a punishment forbidden by law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved, inquire into the want of the court's jurisdiction and give him redress.*"

It has never been denied that where a court-martial, without jurisdiction of the person or of the offense charged, proceeds with a trial and imposes a sentence resulting in the imprisonment of the accused, or where such sentence has been executed without first being approved and confirmed in the manner prescribed by law, it is a nullity and the accused has a remedy in the civil courts and may secure his release through *habeas corpus* proceedings. (*U. S.* v. *Runkle*, 122 *U. S.* 543; *Ex parte Reed*, 100 *U. S.* 13; *In re Siebold*, 100 *U. S.* 371; *In re Clarke*, 100 *U. S.* 399; *Ex parte Mason*, 105 *U. S.* 696;

Smith v. *Whitney*, 116 *U. S.* 167, 177, 179; *United States* v. *Grimley*, 137 *U. S.* 147; *Johnson* v. *Sayre*, 158 *U. S.* 109.)

Deming's failure to raise these objections, when arraigned, did not constitute the officers before whom he was brought, a court-martial, nor did it give the right to try him to any one of them, whom the law (*Art.* 77) forbade to do so. His right to question the validity of General Shafter's order, the existence of the court, its jurisdiction for the sole purpose of its creation, the validity of its sentence, and the legality of his imprisonment, was not waived. The proceedings in the court below were not, in any sense, in the nature of a writ of error. They were instituted for the purpose of preventing a further violation of the law.

In his opinion (*supra*), Judge Sanborn said:

> "*Neither the silence, the consent nor the agreement of the parties can confer it, if it is not granted by the statutes. This court-martial derived no power or jurisdiction from the acts of the Congress of the United States, because it was constituted in direct violation of and not in accordance with them. It was, therefore, entirely without jurisdiction to try the petitioner, and its judgment against him was absolutely void.*"

The Judge Advocate-General of the Army (*Dig. Opin. J. A. G.*, 591), said in one of his opinions:

> "Objections going to the legal constitution or composition of the court, or its jurisdiction, should properly be specially presented when the accused is first called upon to plead: *valid objections of this radical character, however, are not waived, if the accused instead of submitting a special plea, pleads over to the*

merits, since consent cannot confer jurisdiction where none exists."

We submit that the decree of the court below should be affirmed.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Appellee.

APPENDIX.

Opinion of the United States Circuit Court of Appeals, Eighth Circuit, in the case of PETER C. DEMING *on the petition of* JOHN H. ATWOOD, *appellant*, v. ROBERT W. MCCLAUGHRY, *Warden of the United States Penitentiary at Fort Leavenworth, Kansas.*

SANBORN, *J.*:

This is an appeal from an order of the Circuit Court which denied the petition of Peter C. Deming for a writ of *habeas corpus* upon this state of facts: Deming was, on March 29, 1900, a captain in the subsistence department in the volunteer army of the United States. On that day William R. Shafter, a major-general of the volunteer army, and a retired brigadier-general of the regular army of the United States, ordered that a general court-martial, composed entirely of officers of the regular army, should convene "for the trial of Captain Peter C. Deming, Assistant Commissary of Subsistance, U. S. Volunteers," upon some charge, and sentenced him to dismissal from the service of the United States and to confinement in the penitentiary for three years, and this sentence was approved by the Secretary of War and confirmed by the President of the United States. Deming is confined in the penitentiary at Leavenworth, Kansas, under a mittimus based on this judgment. He avers that the sentence upon him is void, and that he is illegally deprived of his liberty because General Shafter, a retired officer of the regular army, had no authority to

convene the court, and because the court-martial which condemned him was not reguarly constituted or organized in that it was composed entirely of officers of the regular army, who were expressly prohibited to hear or determine any charge against him, an officer of the volunteer army, under the 77th article of war (Rev. Stat. Sec. 1342) which reads: "Officers of the regular army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces except as provided in article seventy-eight."

Sanborn, Circuit Judge, after stating the case as above, delivered the opinion of the court:

The petitioner, Deming, was an officer of the volunteer force raised under the act of Congress of March 2, 1899. (30 Stat., c. 352, p. 977.) He was tried and convicted by a court-martial composed of officers of the regular army. The 77th article of war declares that officers of the regular army are not competent to sit on courts-martial to try the officers and soldiers of other forces. The crucial question in this case is: Was this volunteer army the same army as the regular army, or was it a different and supplemental army? Was this volunteer force raised under the act of 1899 the same force as the regular army or was it one of the "other forces" of the United States within the intent and meaning of article 77? On a cursory reading of the article the question does not seem to be difficult nor the true answer to it doubtful. And were it not for the earnest and forceful presentation of their view by the learned counsel for the Government and for the fact that the general commanding the army under the advice of the Judge Advocate General has held that under the acts of April 22, 1898 (30 Stat., c. 187, p. 361), and on March 2, 1899 (30 Stat., c. 352, p. 977), the volunteer force is the same force as the regular army, and that the

officers of the latter may lawfully try the officers of the former (Circular 21, H. Q. A., June 30, 1898), that contention might not seem forceful. But the opinions of the officers of the executive department of a government relative to the construction of a statute whose execution has been entrusted to them justly command, and should receive the careful consideration of the courts, and in doubtful cases they should be permitted to lead the way to their decision. Their opinions ought not to be overruled or disregarded unless upon a deliberate and careful review of the decisions which they render it clearly appears that they are tainted with error.

On the other hand, the decisions of these officers are not controlling or conclusive upon the courts. It is the function and duty of the judicial department of the Government to construe its statutes and to declare their meaning. That duty the courts may not renounce or abandon to others in its discharge; they must exercise their own independent judgment guided only by the established principles of law and the recognized canons of interpretation. While the opinions of the officers of the executive department of the Government may be permitted to lead the way to the proper construction of ambiguous statutes entrusted to them to enforce, yet where the words of the acts are plain and their meaning is clear, these must prevail. (Hartman *v.* Warren, 76 Fed. 157, 162; 22 C. C. A. 30, 36; 40 U. S. App. 331, 342; Webster *v.* Luther, 163 U. S. 331, 342; U. S. *v.* Tanner, 147 U. S. 661, 663; Merrit *v.* Cameron, 137 U. S. 542; U. S. *v.* Graham, 110 U. S. 219; Swift Co. *v.* U. S. 105 U. S. 691.)

Guided by these familiar and indisputable rules of law the question whether the volunteer force raised under the act of 1899 was the same force as the regular army or any of the "other forces" of the United States within the meaning of article 77 will be considered.

The article reads: "Officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces except as provided in article 78." The exception in article 78 relates to the officers of the marine corps and does not withdraw the appellant or the officers who tried him from the prohibition of the general rule announced in article 77.

The provisions of the act of March 2, 1899, pertinent to the issue under consideration are these:

"That from and after the date of the approval of this act the army of the United States shall consist of * * * ten regiments of cavalry, seven regiments of artillery, twenty-five regiments of infantry," and appropriate officers, departments and corps. (30 Stat., c. 352, p. 977.)

"That to meet the present exigencies of the military service, the President is hereby authorized to maintain the regular army at a strength of not exceeding sixty-five thousand enlisted men, to be distributed amongst the various branches of the service, including the signal corps, according to the needs of each, and raise a force of not more than thirty-five thousand volunteers to be recruited as he may determine from the country at large, or from the localities where their services are needed, without restriction as to citizenship or educational qualifications, and to organize the same into no more than twenty-seven regiments organized as are infantry regiments of war strength in the regular army, and three regiments composed of men of special qualifications and horsemanship and marksmanship to be organized as cavalry for service mounted or dismounted—*provided*, that such increased regular and volunteer force shall continue in service only during the necessity therefor, and not later than July 1, 1901. All enlistments for the volunteer force herein authorized shall be for the term of two years and four months unless sooner discharged." (Sec. 12.)

That the President shall have power to continue in service or to appoint by and with the advice of the Senate certain brigadier generals of volunteers and major-generals of volunteers, "*provided*, that regular army officers continued or appointed as general officers or as field or staff officers of volunteers under the provisions of this act shall not vacate their regular army commissions." (Sec. 13.)

That the President is authorized to appoint with the advice and consent of the Senate, officers of the volunteer staff, including twelve assistant commissaries of subsistence with the rank of captains. (Sec. 14.)

That the officers and enlisted men of the volunteer army shall be mustered out of the military service of the United States and discharged as provided in the act of April 22, 1898, provided, that enlisted men of volunteers who desire to remain in the military service may be transferred to, and enlisted in the regular army. (Sec. 15.)

It will not be unprofitable to briefly call to mind the course of the legislation, decision, and practice of the nation relative to the matter in hand prior to 1899 before entering upon the discussion of the question which that act and the 77th Article of War present. The American articles of war of 1776 provided that "the officers and soldiers of any troops, whether minute men, militia or others," should, when joined with the regular forces, be subject to be tried by courts-martial, in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender." Davis' Military Law, p. 617, Section 6 of the act of May 2, 1792, reads in this way: "And be it further enacted, that courts-martial for the trial of militia shall be composed of militia officers only." (1 Stat., c. 28, p. 264). This provision was re-enacted in the act of Feb-

ruary 28, 1795 (1 Stat., c. 36, p. 424). In the act of April 18, 1814 (3 Stat., c. 82, p. 134), and in the act of July 29, 1861 (12 Stat., c. 25, Sec. 5, p. 282). From these acts it will be seen how uniformly the legislation and practice of the nation excluded the officers of the regular army from courts-martial to try the officers and soldiers of the militia. Not only this, but the act of April 10, 1806, which establishes the rules for the government of the armies of the United States contained in this article.

"Article 97. The officers and soldiers of any troops, whether militia or others, being mustered and in the pay the United States, shall, at all times and in all places, when joined, or acting in the conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers of the regular forces, save only that such courts-martial shall be composed entirely of militia officers only." The fact will not be overlooked that under this article the officers of the regular forces were disqualified from trying the officers and soldiers of troops joined or acting in conjunction with the regular army, whether such troops were militia, volunteers, or others. This enactment remained unchanged until in 1874, the present article 77 took its place (Rev. Stat., p. 237; 18 Stat., c. 333, p. 113). During all this time the nation maintained a regular army, and from time to time the President was empowered by Congress to raise volunteer forces to augment the strength of the regular force. Congress provided for the enlistment of volunteers in 1812, for the war with Great Britain (2 Stat., c. 21, p. 676). In 1836, for the Seminole war (5 Stat., c. 80, p. 32). In 1839, to protect the Maine boundary (5 Stat., c. 89, p. 355). In 1846, for the war with Mexico (9 Stat., c. 16, p. 9), and in 1861, for

the War of the Rebellion (12 Stat., c. 9, p. 268; c. 17, p. 274). No opinion of any court, or of any officer of the War Department, rendered prior to June 27, 1898, to the effect that any of these volunteer forces was the same force as the regular army, or to the effect that the officers of the latter were competent to sit on courts-martial to try the officers of the former, either under the old article 97, or the present article 77, has been called to our attention. On November 19, 1863, Judge Advocate General Holt declared that "The words 'militia officers,' as employed in the 97th Article of War, have been interpreted since the commencement of the Rebellion as synonymous, so far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the articles, and in its practical enforcement the object of the rule is accomplished. In the practice of the Department the officers of the regular army were not permitted to sit on courts-martial to try the officers or soldiers of the volunteer force. G. O. 53, Dept. East, 1864; G. O. 16, Dept. Missouri, 1864; G. C. M. O. 11, 13, 16, Dept. Kentucky, 1865. The unanimous opinion of the writers upon military law was that the volunteer army was one of the "other forces" than the regular army, and that the officers of the latter were prohibited from sitting on courts-martial to try the officers or soldiers of the former. Benét on Military Law (Ed. 1866), p. 25; Winthrop's Abridgment of Military Law, 29; Winthrop's Military Law and Precedents (2d Ed.), 92; Davis' Military Law, pp. 27, 496. The decisions of the courts had recognized the two forces as different, the one as temporary, called forth by the exigency of the time, to serve during the war or its imminence, and then to be dissolved into its original elements, the other as permanent and perpetual, to be maintained in peace and in war. U. S. *v.* Sweeney,

157 U. S. 281; U. S. *v.* Merrill, 9 Wall. 614; Kerr *v.* Jones, 19 Ind. 351; Wantlan *v.* White, 19 Ind. 470. The laws of the long-continued practice of a people evidence its public policy. Vidal *v.* Girard's Ex'rs, 2 How. 127, 197; U. S. *v.* Trans-Missouri Freight Association, 58 Fed. 58, 69, 7 C. C. A. 15, 13, 19, U. S. App. 36, 34. The uniform course of legislation, decision and practice upon the subject under consideration for more than a century established the fact that it had become the public policy of the United States to prohibit the trial of the officers and soldiers of the volunteer force and of the militia by the officers of the regular army.

Nor is the reason for this legislation and action far to seek or difficult to discern. It was not, as suggested by counsel for the Government, that the volunteers and militia were citizens of the States and that their officers were generally commissioned by the governors. It lies deeper and is more fundamental and potential. It is grounded in that cardinal principle of Anglo-Saxon jurisprudence that no man shall be tried or condemned save by the hearing and judgment of his peers; in that principle which inspired the rule that deprives judges of the power to try persons accused of heinous crimes in civil life and remits their trial to forum of their peers, the jury.

The officers of the regular army are generally taught in their youth the laws that govern the regular force, that high regard for truth and honor, and that prompt and exact obedience to orders which condition its high efficiency. The officers of the volunteers spend their earlier days without knowledge of military law preparing for agricultural, mechanical, mercantile or professional pursuits, unaccustomed to military discipline and exempt from the controlling commands of superiors. The officers of the regular army make the discipline of that army, the

preparation for war and war itself. The work of their lives, their hopes and their aspirations are to excel in this their chosen profession, and upon it they rely for their livelihood. The officers of the volunteers look to civil pursuits for their ultimate success and sustenance. They leave these pursuits for a few short months at the call of their country to subdue a rebellion against, or to defeat the enemy of their nation. They seek not so much to discipline the army they join and to prepare it for war as to speedily conclude the war, restore peace and return to their chosen pursuits. Their hopes and aspirations center not in their temporary occupation, but in the pursuits they have left and to which they are soon to return. More than all this the officers of the regular army know the unwritten code of military thought and action, the habit of the trained soldier's life and know them so well that their practice is involuntary, while a neglect of them seems inexcusable. The officers of the volunteer force come to the army in ignorance of this code and custom. They have short time to learn or to practice them, their invariable practice does not always seem to them essential to the defeat of the enemy and a speedy peace, and the heinousness of a disregard of some of them does not always impress them. So it is that the thoughts, actions, habits and ambitions of the officers of the regular army differ widely from those of the volunteers. Many things in the life of the soldier seem vital to the former that have small importance in the eye of the latter. Many military offenses seem heinous to the former that appear venal to the latter. Congressmen have not been ignorant of these facts. They have associated with, known and honored the officers of the regular army. They have known their pride in their profession, in the efficiency of their regular force and the abhor-

rence with which they have looked upon any breach of either the moral or the military law. They have known the volunteers. These have been their constituents and their friends. Many of the members of Congress have been volunteers themselves. In the light of these facts and with this knowledge they have thought that the officers and soldiers of the volunteer force ought not to be tried by the officers of the regular army. And they have made and maintained the legislation which has been quoted for more than a century to carry that thought into effect. This, then, was the situation when the act of April 22, 1898, under which a judge-advocate general first held that officers of the regular army could lawfully sit on courts-martial to try the officers and soldiers of the volunteer force, was passed. The acts of Congress had prohibited for nearly a century and still expressly forbade it. The decisions and the practice of the officers of the War Department interdicted it. The established policy of the nation inhibited it. In the light of this legislation, decision and policy, the acts of 1898 and 1899 must be read and construed. What was there in these facts to repeal the statutory inhibition and reverse the public policy of a century? The decisions, the policy and the practice rested on the acts of Congress, and certainly nothing less than an expressed repeal by that body of the plain inhibition of article 77, or such legislation as clearly shows the undoubted intention of Congress to strike it down, ought to be permitted to withdraw it and to reverse the policy and practice of so many years.

The first argument in support of the contention of the Government that the acts of 1898 and 1899 have had this radical effect is that while the volunteer army was one of the "other forces" than the regular army under article

77, prior to the act of 1898, that act made it the same force as the regular army, because it provides that the organized and acting land forces of the United States shall consist of the Army of the United States, and of the militia of the several States when called into the service of the nation, and the regular army is the permanent military establishment which is maintained in peace and in war, and that the volunteer army is maintained only during the existence of war or while war is imminent, and is raised and organized only after Congress authorizes the President so to do (30 Stat., c. 187, Secs. 2, 3, and 4, p. 361). They insist that this enactment declares that there were but two forces of the United States, the army and the militia, and that, as the regular army was one part of the former force, and the volunteer army was another part of the same force, the latter army could not, after this enactment, be one of the "other forces" than the regular army under article 77. There are several reasons why this argument fails to convince. In the first place there is no repeal, notification or reference to the provisions of article 77, in this act or in the act of 1899. There is nothing in either of them to indicate that in considering or enacting this legislation Congress intended to modify the terms or the effect of that article, and as no such intention appears in the legislation the conclusive presumption is that no such intention existed. Moreover, the care and emphasis with which the difference between the regular army and the volunteer army is maintained throughout the act of 1898, demonstrate the fact that it was the positive intention of Congress to maintain the distinction between the two forces. Starting with the declaration that the active land forces shall consist of the army and the militia, that the regular army is the permanent military establishment and the volunteer army is the tempor-

ary force in which enlistments shall be for a term of two years unless sooner terminated, it contains these significan provisions:

"SEC. 5. That when it becomes necessary to raise a volunteer army the President shall issue his proclamation stating the number of men desired. * * *"

"SEC. 6. That the Volunteer Army and the militia of the States when called into the service of the United States shall be organized under, and shall be subject to, the laws, orders and regulations governing the Regular Army. * * *"

"SEC. 7. That all organizations of the Volunteer Army shall be so recruited from time to time as to maintain them as near to their maximum strength as the President may deem necessary. * * *"

"SEC. 8. That all returns and muster rolls of the volunteer army 'shall be rendered to the Adjutant-General of the army and filed in the record and pension office of the War Department.'"

"Sec. 9. That in time of war, or when war is imminent, the troops in the service of the United States, whether belonging to the Regular or Volunteer Army or to the militia, shall be organized into divisions of three brigades."

Sec. 10 relates to staff officers.

"Sec. 11. That the President is hereby authorized to appoint in the Volunteer Army 'one major-general for each army corps or division and one brigadier-general for each brigade,' and any officer so selected and appointed from the regular army shall be entitled to retain his rank therein."

"Sec. 12. That all officers and enlisted men of the volunteer army and of the militia of the States, when in the service of the United States, shall be in all respects on the same footing as to pay, allowances, and pensions as

that of officers and enlisted men of corresponding grades in the regular army."

"Sec. 13. That the governor of any State or Territory may, with the consent of the President, appoint officers of the regular army in the grades of field officers in organizations of the Volunteer Army, and officers thus appointed shall be entitled to retain their rank in the Regular Army. * * *"

"Sec. 14. That the general commanding a separate department or a detached army is authorized to appoint from time to time military boards of not less than three or more than five volunteer officers of the Volunteer Army to examine into the capacity, qualifications, conduct, and efficiency of any commissioned officer of said army within his command. * * *"

These various sections are utterly inconsistent with the view that the volunteer army was made the same force as the regular army, and that all distinctions in the treatment and trial of the members of the two forces were stricken down by the casual enumeration of the active land forces of the nation in the first section of the act. If the volunteer army was the regular army why the declaration in section 6 that the volunteer army should be subject to the laws, orders and regulations governing the regular army, in section 12, that the officers and enlisted men of the volunteer army should be on the same footing as men of corresponding grades of the regular army, and in section 13 that officers of the regular army commissioned as officers in the volunteer army should retain their rank in the former? These provisions are pregnant with significance. But section 14 places the purpose and intention of the law makers to maintain the established rule that the volunteer army was one of the "other forces" than the regular army within the meaning of article 77, and the law and the policy that

their officers and soldiers should not be tried by the officers of the regular army, beyond doubt or cavil. It provides for military boards to examine into the capacity, qualifications, conduct and efficiency of officers of the volunteer army. But in accordance with the then existing law and policy of the nation it excludes from these boards all officers of the regular army and directs that they shall be composed entirely of officers of the volunteer force. When the entire act of 1898 is carefully read and considered it is found to contain no indication of any intention on the part of Congress to modify the terms or the settled construction of article 77. On the other hand, it evidences a plain purpose to maintain the rule and policy which classified the volunteer army among the "other forces" than the regular army, and prohibited the officers of the latter force from sitting on courts-martial to try the officers and soldiers of the former.

Another reason why the argument based upon the classification in the first section of this act is not persuasive is that it is fallacious. Stated in syllogistic form it is: the land forces are composed of the army and the militia. The army is composed of the regular army and the volunteer army. Therefore the volunteer force is the regular force. When thus stated the fallacy is apparent. The contention is based on the false assumption that every part of a military force is the same part as every other part. That every species of a genus is the same as every other species of that genus; that every class properly described by a generic term is the same class as every other class covered by that term. Illustrations make the fallacy plain. Oranges and apples are fruit, yet oranges are other fruit than apples. The Russians and Americans are people, and yet the white Americans are other people than the black Americans. The cavalry, infantry and artillery

of the regular army is a military force, and yet the cavalry and infantry are other forces than the artillery. So the regular army, and the volunteer army under the classification of 1898 constitute a force, and yet the volunteer army both in fact and within the meaning of article 77 is another force than the regular army.

Again, even if the contention of counsel for the Government were conceded, it would but serve to strengthen the position that the petitioner, who was commissioned under the act of 1899, was a member of other forces than the regular army. The argument rests entirely on the declaration of the act of 1898 that the Army of the United States is composed of the regular army and the volunteer army, and that the land forces consist of the army and the militia. The act of 1899 contains no such classification, but on the other hand expressly declares that the "Army of the United States shall consist" of the cavalry, infantry and artillery of the regular army; that the regular army may be temporarily increased to 65,000 men, and that the President may "raise a force of not more than thirty-five thousand volunteers" (30 Stat., c. 352, Secs. 1, 12, pp. 977, 979). The petitioner is one of these volunteers, and if the effect of the classification of 1898 had been all that counsel claims, yet by the literal terms of the act of 1899, Deming was a member of another force than the regular army—a member of the volunteer force.

Counsel for the Government advance another argument in support of the contention that the volunteers under the acts of 1898 and 1899 were not other forces than the regular army. It is that the law and the practice upon this subject during the War of the Rebellion were established to prevent State troops from being tried by officers of the regular army; that the volunteers during that war were raised by the States and officered by their governors,

and that their regiments were designated by the names of the States from which they came, while the volunteers called under the acts of 1898 and 1899 were raised under a different system, were not so nearly assimilated to the militia, and that those received under the act of 1899 were not apportioned to or raised by the States, their regiments were not designated by the names of the States, but like the regulars they were enlisted from the country at large; their regiments took numbers supplemental to those of the regiments of the regular army and their officers were appointed not by the governors but by the President.

This contention, in our opinion, is based on a misconception of the real reasons which inspired the legislation and the policy which, for so many years, has prohibited the trial of volunteers by regulars. That reason was not that the volunteers were State troops, and the regulars national troops, that the volunteers were raised by the States and their officers were appointed by the governors, while the regulars were raised by the nation, and their officers were commissioned by the President. It was, as has been shown in an earlier part of this opinion, that the knowledge, training, habits, hopes, and ambitions of the officers of the regular army, who had devoted themselves for life to the discipline and efficiency of that force, necessarily conditioned their opinions of the heinousness of military offenses, and these opinions, this knowledge and training, these hopes and ambitions differed so widely from those of the officers of the volunteer force, who came from civil life for a limited time, ignorant of military law and of the customs and practices of a soldier's life, and anxious to speedily return to their civil occupations, that Congress established the rule that the former should not be competent to sit on courts-martial for the trial of the

latter. The reason of this rule applies to the volunteer force raised under the act of 1899 with as much force as to those raised during the War of the Rebellion.

Finally, it is contended that the provisions of section 6 of the act of April 22, 1898, "that the Volunteer Army and the militia of the States, when called into the service of the United States, shall be organized under, and shall be subject to, the laws, orders, and regulations governing the Regular Army," indicates that the volunteer army and the militia are a part of the regular army, and hence the same force as that army within the meaning of article 77. The enactment appears to us to demonstrate the contrary, and that because if the volunteers and the militia were a part of the regular army they were subject to the laws, orders, and regulations governing it, without a special declaration to that effect. A similar provision may be found in the act of July 22, 1861 (12 Stat., c. 9, Sec. 2, p. 269), under which the volunteer forces for the War of the Rebellion were enlisted, and yet those volunteers were held to be other forces than the regular army.

The result is that when the acts of 1898 and 1899 were passed there was an article of war in force enacted by Congress which expressly prohibited the officers of the regular army from sitting on courts-martial to try the officers or soldiers of other forces. Prior to the passage of these acts the volunteer force was in fact and had b en uniformly held to be one of these other forces, so that in law and in practice this article of war forbade the officers of the regular army to try the officers or soldiers of the volunteers. There is no express repeal or modification of this inhibition in the acts of 1898 and 1899. There is nothing in these acts repugnant to or inconsistent with the prohibition, nothing to show that Congress intended thereby to withdraw or to change it, but strong indica-

tions, in the marked distinction it studiously maintained between the regular army and the volunteer army, and in the fact that it provided for military boards composed entirely of officers of the volunteer army to examine into the efficiency and qualifications of the volunteer officers, that it intended to preserve and to maintain the inhibition. The reason which inspired this legislation and the policy and practice it evidences applies with all its cogency and force to the officers and soldiers of the volunteer force raised under the act of 1899. These facts and the consideration to which we have adverted have irresistibly forced our minds to the conclusion that the volunteer force raised under the act of 1899 was not the same force as the regular army, but that it was one of the "other forces" specified in article 77, and that the officers of the regular army were prohibited by that article to sit on any court-martial to try the petitioner who was an officer of the volunteer force raised under the act of 1899.

It is insisted, however, that if the members of this court-martial were disqualified to try the petitioner, that objection was waived because not made at the trial, and that the judgment was not void, but merely erroneous and voidable, so that it was impregnable to collateral attack by the writ of *habeas corpus*. A writ of *habeas corpus* cannot be made to perform the office of a writ of error, but it is the proper process to challenge a void judgment and to relieve the defendant from its baleful effect. It may not be invoked to review and avoid an erroneous judgment, of which the court had jurisdiction, but it is always effective to relieve a prisoner from the restraint imposed by a judgment that is absolutely void. *In re* Reese, 107 Fed. 942, 948; *In re* Buskirk, 72 Fed. 14, 21, C. C. A. 410, 417; 25 U. S. App. 613, 615; *Ex-parte* Ayers, 123 U. S. 443; *Ex-parte* Fisk, 113 U. S. 713, 718;

Dynes *v.* Hoover, 61 U. S. 81, 83; *Ex-parte* Reed, 100 U. S. 13, 23; *In re* Coy, 127 U. S. 731; *Ex-parte* Yarbough, 110 U. S. 651; U. S. *v.* Pridgeon, 153 U. S. 48, 59; Rose *v.* Roberts, 99 Fed. 948; 40 C. C. A. 199. A judgment or sentence of a court which had no jurisdiction on the subject-matter or of the person affected by its adjudication is absolutely void. But the judgment or sentence of a court empowered to hear and determine the issues relative to the subject-matter and the person affected by its decision, although it may be wrong and irregular, is simply voidable and cannot be successfully attacked collaterally. Foltz *v.* St. Louis and S. F. Ry. Co., 60 Fed. 316, 318; 8 C. C. A. 635, 637; 19 U. S. App. 576, 581. Hence the question here presented is, did this court-martial have jurisdiction to hear and try the petitioner for the offence of which he was charged? The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudications which they render and that their judgments are valid. But no such presumption accompanies the sentence of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown.

A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. The articles of war specify the officers who are empowered to convene the courts (articles 72, 73, 74, 81, 82), the officers who may compose them (articles 75, 76, 77, 78, 80), and the persons and charges which they are empowered to try (articles 77, 78, 80, 81, 82, 83), it necessarily follows that the jurisdiction of every court-martial, and hence the

validity of its judgments, is conditioned by these indispensable prerequisites: (1) that it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were those whom he was authorized by the articles of war to detail for that purpose; (3) that the court thus constituted was invested by the acts of Congress with power to try the person and the offence charged, and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial *coram non judice* and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction. Runkle *v.* United States, 122 U. S. 543, 546; Mills *v.* Martin, 19 Johns. 7, 30; Wise *v.* Withers, 3 Cranch, 331; *Ex-parte* Watkins, 3 Pet. 193, 207; Dynes *v.* Hoover, 20 How. 65, 80.

Let us now measure the contention that the judgment of this court-martial which condemned the petitioner to dismissal and imprisonment was not void, but was merely irregular and erroneous by these indisputable principles. The 88th article of war reads: "Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof and shall not receive a challenge to more than one member at a time." The acts of Congress make no provision for a challenge to the array, and point out no method whereby the question of their disqualification of all the members may be determined in the first instance by any one but the members of the court themselves challenged one by one.

It is said that a court-martial is like a jury, that the reviewing officer occupies the place of a judge, that the disqualification of a juror, if not suggested at the trial, is

waived and does not render the verdict void (Kohl *v.* Lehlback, 160 U. S. 293; Clark *v.* Van Vracken, 20 Barb. 281, 6 Opin. Atty. Gen. 206), and that the judgment of this court-martial ought not to be held void because all its members were incompetent to sit upon it. But in the essentials of the issue that analogy does not hold. The question of the qualification of triers arises *in limine*. It is to be determined before the trial commences. In the case of a trial by a jury, the judge, not the jury, determine the qualifications of the jurors, while in a trial by a court-martial the members of the court must determine their own qualifications, and if all the members are incompetent to sit in the court at all, how can they be competent to decide that they are either competent or incompetent to act there? Moreover, a jury decides nothing but the questions of fact, while the members of a court-martial determine both the law and the facts. The argument is not persuasive. Indeed the analogy between the judgment of a court-martial and the judgments of courts composed of disqualified judges is much closer. All the members of this court-martial were disqualified. It was a court of inferior or limited jurisdiction. Why should its judgment have more virtue than those of courts of general jurisdiction, some of whose judges are incompetent to sit? Yet the rule, generally supported by the great weight of authority, is that the judgments of such courts are void, and that neither waiver nor consent can give them validity. Case *v.* Hoffman, 100 Wis. 314, 356; Oakley *v.* Aspinwall, 3 N. Y. 547, 552; Low *v.* Rice, 8 Johns. 409; Clayton *v.* Per Dun, 13 Johns. 218; Edwards *v.* Russell, 21 Wend. 63; People *v.* Connor, 142 N. Y. 130, 133; Chambers *v.* Clearwater, 1 Keyes (N. Y.), 310; Sigourney *v.* Sibley, 21 Pick. 101, 106; Gay *v.* Minot, 3 Cush. 352; Hall *v.* Thayer, 105 Mass. 219, 224; Chicago

& Atlantic Ry. Co. *v.* Summers, 113 Ind. 10, 17; Ochus *v.* Sheldon, 13 Fla. 138; Chamber *v.* Hodges, 23 Tex. 112; Gains *v.* Barr, 60 Tex. 676, 678; Templeton *v.* Giddings, 12 S. W. (Tex.), 851.

The insuperable objection, however, to the jurisdiction of this court-martial and to the validity of its sentence is that the officer who called it was not only unauthorized but was positively prohibited by act of Congress to constitute it of the officers of the regular army, to detail these officers to sit upon it, and when these officers were so detailed they were in like manner prohibited from responding to the call and from becoming members of the court. The order convening the court-martial declared that the purpose of its call was "for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. Volunteers," and it commanded nine officers of the regular army to meet and sit upon the court. The 77th article of war prohibited General Shafter, who issued this order, from directing these officers to sit upon a court-martial to try this officer of the volunteer force, and forbade them to do so. The court was therefore illegally constituted. It did not have a single member upon it that that commanding officer had the power to direct to participate in the trial of the petitioner, or that could lawfully so do. "It was necessary to show that the court was legally constituted in order to gain the jurisdiction of the person and offenses of those who were to be tried before it." Mills *v.* Maryin, 19 Johns. 33. "To give effect to its sentence it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law." Runkle *v.* United States, 122 U. S. 556. In the Army of the United

States courts-martial derive their power, their jurisdiction from the acts of Congress. Neither the silence, the consent nor the agreement of the parties can confer it if it is not granted by statutes. This court-martial derived no power or jurisdiction from the acts of Congress of the United States, because it was constituted in direct violation of and not in accordance with them. It was therefore entirely without jurisdiction to try the petitioner, and its judgment against him was absolutely void.

The judgment below must accordingly be reversed, and the case must be remanded to the Circuit Court with directions to issue a writ of *habeas corpus* and to proceed in accordance with the views expressed in this opinion, and it is so ordered.